In the absence of such objection the tender was a valid one." It is submitted that such language, seeming to imply that, had the non-production of the money been duly objected to, or the production demanded, the tender would have been insufficient unless the debtor had remedied the defect, does not properly state the California law on this point.

The common law rule was that, to make a tender valid, the money had to be produced when the offer of payment was made, whether the offer was accepted, or not.[2] But production was a mere formality, which was waived by failure to object to its non-production, at the time of the offer.[3] It was not an essential element of the transaction, as was the debtor's ability to pay.[4] Such was also the rule in California before the adoption of the Codes,[5] and there is at least one case since that time which uses language very similar to that in the principal case.[6]

But the Civil Code has changed all that.[7] It now does the creditor no good to object to the non-production of the money, and he gets no rights by demanding its production.[8] If, as in the case under consideration, he did not accept the offer, there is an end of it, and until he does accept, it is idle to talk of non-production, or of waiver of production. The rule having been changed there would seem to be no reason for retaining the phrasing of the former doctrine; and the use of such expressions as those quoted above can only be explained on the theory that the courts, in cases where the point has not come directly before them, have unconsciously lapsed into the language of the common law.

*H. J. W.*

TORT: FALSE IMPRISONMENT: LIABILITY OF JUSTICE UNDER COLORABLE JURISDICTION.—In the case of *Hayes v. Hutchinson & Shields*[1] a justice of the peace acting in compliance with the Washington code,[2] which purported to give him jurisdiction, issued a

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[2] Bakeman v. Pooler (1836), 15 Wend. 637; Strong v. Blake (1865), 46 Barb. 227; Liebbrandt v. Myron Lodge No.1 (1871), 61 Ill. 81; Deering Harvester Co. v. Hamilton (1900), 80 Minn. 162, 83 N. W. 44; Erickson v. Thelin (1910), 26 S. D. 441, 128 N. W. 598.

[3] Bender v. Bean (1889), 52 Ark. 128, 12 S. W. 241; Ventres v. Cobb (1882), 105 Ill. 33; Germania Life Ins. Co. v. Potter (1908), 124 N. Y. App. Div. 814, 107 N. Y. Supp. 435.

[4] Breed v. Hurd (1828), 6 Pick. 356; Proebstel v. Trout (1911), 60 Ore. 145, 118 Pac. 551.

[5] Englander v. Rogers (1871), 41 Cal. 420.

[6] Green v. Barney (1894), 36 Pac. 1026, 4 Cal. Unrep. Cas. 665.

[7] Cal. Civ. Code, § 1496: "The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted." See also, Code Commissioners' note, Cal. Civ. Code Annotated, ed. 1874, § 1496.

[8] Peckham v. Stewart (1893), 97 Cal. 147, 31 Pac. 928; Latimer v. Capay Valley Land Co. (1902), 137 Cal. 286, 70 Pac. 82; Doak v. Bruson (1907), 152 Cal. 17, 91 Pac. 1001.

[1] (Sept. 4, 1914), 142 Pac. 865.

[2] Rem. & Bal. Code, §§ 749, 1790.

warrant for the arrest of an absconding debtor. Shortly thereafter, the code sections were declared unconstitutional, and the provisions of the state constitution[3] providing for the arrest of absconding debtors, were held to be executory and dependent on legislative action, other than the code provisions, which antedated the constitution.[4] The court held that where a justice of the peace had a colorable jurisdiction, and where no malice was alleged, an action for false imprisonment could not be maintained against him; the unconstitutional provisions of the code were held to give a colorable jurisdiction.

The question here raised depends upon an application of the principles of judicial immunity. There is a well recognized line of cases, which holds an inferior judge liable at his peril if he acts without jurisdiction,[5] on the ground that since his jurisdiction has been limited "he best observes the spirit of the law by solving all questions of doubt against his jurisdiction", and can escape liability without violating his duty, being subject to reversal in the appellate courts.[6] Equally well recognized and it is believed better reasoned decisions hold the opposite view,[7] and in accord with the principal case, that the reasons for exempting superior judges apply with equal force in the case of a justice of the peace. It is rightly said that "a magistrate could not be respected, or independent, if his motives for his official action, or his conclusions could be put in question at the instance of every disappointed suitor."[8]

It is of peculiar note that the arresting creditor in this case was held liable for false imprisonment. That this is the law is not disputed;[9] but to the layman, it can hardly help being somewhat incomprehensible, in view of the fact that the justice who is presumably versed in the law, is protected. As Chief Justice Abbott once said, "God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law."[10]

*W. W. L., Jr.*

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[3] Wash. Const. art. i, § 17.

[4] Hamilton v. Pacific Drug Co. (March 17, 1914), 78 Wash. 689, 139 Pac. 642.

[5] Piper v. Pearson (1854), 68 Mass. 120, 61 Am. Dec. 438; Barker v. Stetson (1856), 73 Mass. 53, 66 Am. Dec. 457; De Courcey v Cox (1892), 94 Cal. 665, 30 Pac. 95; Cooley on Torts, 3rd ed., 809.

[6] Cooley on Torts, 3rd ed., 810, 811.

[7] Calhoun v. Tittle (1898), 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630; Grove v. Van Duyn (1882), 44 N. J. L. 654, 43 Am. Rep. 412; Brooks v. Mangan (1891), 86 Mich. 576, 49 N. W. 633.

[8] Robertson v. Parker (1898), 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889.

[9] Strozzi v. Wines (1899), 24 Nev. 389, 55 Pac. 828.

[10] Montriou v. Jefferys (1825), 2 Car. & P. 113, 12 Eng. Com. Law Rep. 479.